LE COPY

FILED
JUL 26 1960
JAMES R. BROWNING, Clerk

No. 189

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMONWEALTH ENGINEERING COMPANY OF OHIO,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Foreign Trade Management Co., Inc. v. *United States*, 109 C. Cls. 587	7
Freund v. *United States*, 260 U.S. 60	8
Fruhauf Southwest Garment Co. v. *United States*, 126 C. Cls. 51	6, 7, 8, 9
Hartsville Mill v. *United States*, 271 U.S. 43	7, 8
Holland Page, et al. v. *United States*, 120 C. Cls. 27	7
Kohen v. *H. S. Crocker Company*, 260 F. 2d 790	6
Mason v. *United States*, 84 U.S. 67	6, 7
Silliman v. *United States*, 101 U.S. 465	6, 7
Universal Sportswear, Inc. v. *United States*, 180 F. Supp. 391	7
United States v. *Blair*, 321 U.S. 730	8
United States v. *Callahan Walker Construction Co.*, 317 U.S. 56	9
W. R. Grimshaw Company v. *Nevil C. Withrow Co.*, 248 F. 2d 896, certiorari denied, 356 U.S. 912	6, 7

Statute:

First War Powers Act of 1941, 55 Stat. 838, as amended, 64 Stat. 1257	4

Miscellaneous:

5 Williston, *Contracts* (Rev. ed., 1937):	
§ 1603	6
§ 1606	6
§ 1608	6

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 189

COMMONWEALTH ENGINEERING COMPANY OF OHIO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 13-20) is reported at 180 F. Supp. 396.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. The petitioner's timely motion for rehearing was denied on April 6, 1960. The petition for a writ of certiorari was filed on June 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in the particular factual circumstances of this case, the Court of Claims properly ruled that there was no showing of duress on the part of the Government by which the petitioner could escape the binding effect of its settlement agreement.

2. Whether the Court of Claims correctly held that, even if there was duress invalidating the settlement agreement, the contract was thereby terminated for the convenience of the Government, and the petitioner was precluded from judicial relief because of its failure to exhaust its administrative remedies.

STATEMENT

The petitioner's action in the court below was dismissed for failure to state a claim upon which relief could be granted (Pet. App. 19-20). Hence, the facts in the case are to be accepted as stated in the amended petition and exhibits attached thereto filed in the Court of Claims.

On May 20, 1952, the petitioner entered into a negotiated contract with the Air Force whereby it agreed to design and fabricate an experimental electronic device known as a noise spectrometer for the contract price of $95,711.72, later amended to $102,447.22 (Pet. App. 13). The contract provided for upward or downward price revision with a ceiling price of $104,412.70, later amended to $111,148.29 (Pet. App. 13).

The petitioner subsequently commenced performance of the contract, the delivery date of which was

ultimately extended to June 26, 1956 (Pet. App. 13). Upon completion of the apparatus in July, 1955, tests disclosed erratic performance (Pet. App. 14). The Government refused to accept delivery, informing the petitioner that changes involving additional costs of $10,000 would be required to eliminate the defects (Pet. App. 14).

Subsequent to this determination, the parties met at a conference to negotiate a settlement of the dispute (Pet. App. 14). There the Government's agents told the petitioner's representatives that the Government desired to terminate the contract for its convenience, as provided in the contract. The petitioner was further informed that the Government would accomplish the required changes at its own laboratories with the result that the contract price would be lowered $10,000 (*i.e.*, from $102,447.22 to $92,447.22) (Pet. App. 14). The petitioner was also informed that, if it did not agree to this procedure, the contract would be terminated for default and relet, with excess costs, if any, charged to the petitioner's account (Pet. App. 14).

It was further alleged below that any such termination by default with the possibility of shouldering excess costs "would have bankrupted" the petitioner (Pet. App. 14). However, nowhere in its amended petition below did the petitioner charge that the Government was in any way responsible for its financial situation nor, indeed, that the Government was even aware of that situation.

The petitioner, claiming that it did so under threat of financial disaster, agreed to this termination settle-

ment (Pet. App. 14). It asserted, however, that its letter of April 3, 1956, to Air Force representatives setting forth the terms of the proposed termination for the convenience of the Government was held objectionable by these representatives because of the inclusion of a right of contract price redetermination and appeal (Pet. App. 14). The letter was accordingly revised and resubmitted by the petitioner (Pet. App. 14).

The petitioner never filed a claim under the termination for convenience provisions of the contract, nor did it appeal under the disputes clause of the contract (Pet. App. 19). Rather, it sought review of the action of the Air Force representatives by applying for relief under the First War Powers Act of 1941, 55 Stat. 838, as amended, 64 Stat. 1257 (Pet. App. 15). On November 15, 1957, the Air Force Contract Adjustment Board advised the petitioner that it did not have jurisdiction to review the case under that Act[1] (Pet. App. 15).

Seeking damages of $52,117.16, the petitioner instituted its suit in the Court of Claims.[2] That court dismissed for failure to state a claim upon which relief could be granted. The court held initially that

---

[1] The petitioner's challenge of this determination below was rejected by the Court of Claims (Pet. App. 15). The petitioner has abandoned all contentions involving the First War Powers Act of 1941 in its petition in this Court.

[2] Previously, the petitioner had filed the same action in the United States District Court for the Southern District of Ohio, which court had dismissed for lack of jurisdiction in view of the amount of damages claimed (Pet. App. 15).

the mere statement of financial difficulties, for which the Government was in no way responsible, and the nature of the alleged threat of the Air Force representatives clearly did not demonstrate duress which would invalidate the settlement agreement (Pet. App. 16-17). In any event, the court below continued, even if there was present in this case the type of threat that invalidates a settlement agreement, such a conclusion only meant that the Government had effectuated a termination for its convenience, as provided for under the contract, which, along with price revision, could be accomplished unilaterally by the contracting officer (Pet. App. 17-19). The petitioner had never filed a claim or appealed this determination under the disputes clause of the contract and, thus, it was foreclosed from judicial relief by failure to exhaust its administrative remedies (Pet. App. 19).

ARGUMENT

This case presents no issue appropriate for this Court's consideration. No conflict of decisions is involved and no important issue of law. On the basic question of duress, the decision of the Court of Claims dismissing the petition rests upon the application of settled principles of contract law to the particular facts of this case. The decision, both as to duress and the other points in issue, is clearly correct and warrants no further review.

1. The principal question posed by the petitioner is whether, on the facts as pleaded below, there was duress that would invalidate its settlement agreement with the Government. Application of the concept of

duress, of course, is entirely dependent upon the factual circumstances of each individual case. *E.g.*, *Silliman* v. *United States*, 101 U.S. 465; *Mason* v. *United States*, 84 U.S. 67; *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51; 5 Williston, *Contracts*, § 1603 (Rev. ed., 1937). Duress is normally applicable in the context of a threat of a wrongful act, but not where the only factor relied on is the use of a remedy provided by law or by contract, which is superimposed on a party's asserted precarious financial condition. 5 Williston, *Contracts*, §§ 1606, 1608 (Rev. ed., 1937).

As the Court of Claims ruled, however, these considerations are the only ones presented by the amended petition filed in that court, and thus the petitioner failed to state a claim based on duress. With regard to the financial aspect, the petitioner's sole complaint was that it was constrained to accept the Government's settlement offer of a reduction of $10,000 in the contract price because of its financial situation. It did not claim either that the Government was responsible for its financial predicament or that the contracting officers were even aware of this situation. Moreover, it did not allege, nor could it in view of the termination for convenience provisions of the contract, that the Government had no right to seek a reduction in the contract price.

In similar factual circumstances, the courts have consistently held the concept of duress inapplicable. *Silliman* v. *United States*, 101 U.S. 465; *Kohen* v. *H. S. Crocker Company*, 260 F. 2d 790 (C.A. 5); *W. R. Grimshaw Company* v. *Nevil C. Withrow Co.*,

248 F. 2d 896 (C.A. 8), certiorari denied, 356 U.S. 912; *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51; *Foreign Trade Management Co., Inc.* v. *United States*, 109 C. Cls. 587. As the Eighth Circuit observed in *Grimshaw*, *supra*, in terms equally applicable here, there must be a showing "that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities." 248 F. 2d at 904.

The petitioner's claim of duress based on the Government's threat to terminate the contract for default and to relet, if the petitioner did not agree to the $10,000 reduction, is equally lacking in merit. The Government's right to terminate the contract for default is as clearly provided in the contract as its right to terminate for its own convenience. And it is well established that threatened use of a remedy provided by contract does not constitute duress. *Hartsville Mill* v. *United States*, 271 U.S. 43; *Mason* v. *United States*, 84 U.S. 67; *W. R. Grimshaw Company* v. *Nevil C. Withrow Co., supra*; *Holland Page, et al.* v. *United States*, 120 C. Cls. 27. The petitioner's proper course of action, if it considered a termination for default unjustified in the circumstances, was to disregard the threat and "apply to the courts for redress" if the termination for default and assessment of excess costs eventuated. *Silliman* v. *United States*, 101 U.S. 465, 471; see also, *Hartsville Mill* v. *United States*, 271 U.S. 43; *W. R. Grimshaw Company* v. *Nevil C. Withrow Co., supra*.

The petitioner's reliance on cases such as *Ozark Sportswear Inc.* v. *United States*, 180 F. Supp. 391 (C. Cls.)

2. While the decision below that the Government exercised no duress disposes of the entire case, there is an additional ground on which the petitioner's claim falls. If, indeed, there was duress invalidating the settlement agreement, the petitioner's position is in no way improved. In that event, the action of the contracting officer, terminating the contract and reducing the contract price $10,000, plainly constituted a unilateral decision under the termination for convenience provisions of Article 21 of the contract. *Fruhauf Southwest Garment Co.* v. *United States*, 126 C. Cls. 51. As the Court of Claims observed with respect to Article 21 (Pet. App. 18-19), where the parties fail to agree, the contracting officer may terminate unilaterally and determine the amount due the contractor.

Consequently, if there was no agreement because of coercion, the only remedy available to the contractor was the filing of a claim and an appeal under the disputes clause as required by the termination for convenience provisions. *Fruhauf Southwest Garment Co., supra.* The contractor failed to take these necessary steps and thus was precluded from judicial relief below by failure to exhaust its administrative remedies.[1] *United States* v. *Blair*, 321 U.S. 730;

---

and *Freund* v. *United States*, 260 U.S. 60, as unwarranted in that those cases are distinguishable factually on the specific bases set forth in the Court of Claims' opinion here (Pet. App. 16-17). See also, *Hartsville Mill* v. *United States*, 271 U.S. 43.

[1] The petitioner attempts to avoid the holding below as to failure to exhaust by urging two arguments, neither of which, upon analysis, has merit. First, assuming duress,

United States v. Callahan Walker Construction Co., 317 U.S. 56; *Fruhauf Southwest Garment Co., supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERBERT E. MORRIS,
Attorneys.

JULY, 1960.

---

the petitioner contends that the settlement agreement was not thereby invalidated or made void, but merely rendered "voidable", thus assertedly precluding appeal under the disputes clause. It is clear, however, that whatever labels the petitioner attaches to the agreement, it had the duty to raise the objections it had to the manner and nature of the termination by way of the disputes clause procedure. *Fruhauf Southwest Garment Co., supra.*

The petitioner's other argument on this issue is that it was somehow stripped of its right of administrative appeal by the contracting officer's demands with regard to its letter accepting termination for convenience, *supra*, pp. 3-4. This contention, however, overlooks the fact that if the agreement was invalidated by duress, the letter and all demands made of the petitioner with regard to the settlement agreement were also invalidated. In any event, the letter as finally submitted by the petitioner (Exhibit B to the amended petition below) did not purport in any way to waive rights under the contract.

U. S. GOVERNMENT PRINTING OFFICE 1960